

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United Food and Commercial Workers) No. CV-11-921-PHX-GMS
Local 99 et al.,)

ORDER

Plaintiffs,
-and-
Arizona Education Association, et al.,
Plaintiff-Intervenors,
vs.
Jan Brewer, in her capacity as Governor of
the State of Arizona, et al.,
Defendant.

Pending before this Court are Plaintiffs' Motion for Preliminary Injunction and Plaintiff-Intervenors' Motion for Preliminary Injunction. (Docs. 14, 77). For the reasons stated below, Plaintiff-Intervenors' Motion is granted and Plaintiffs' Motion is dismissed as moot.

BACKGROUND

24 An employee in the state of Arizona may authorize his or her employer to withhold
25 certain amounts from the employee's pay and to transfer those funds to a separate entity.
26 Through such payroll deduction programs, employees pay their health care or other welfare
27 benefit premiums to insurance companies, invest for retirement with banks and financial
28 institutions, make donations to charitable organizations, and pay dues to their unions. All of

1 these organizations are permitted to engage in political activity, including lobbying, by using
2 money in their general operating fund. *See Citizens United v. FEC*, 130 S. Ct. 876, 904
3 (2010).¹

4 On April 18 and 19, 2011, the Arizona House and Senate passed Senate Bill 1365, the
5 “Protect Arizona Employees’ Paychecks from Politics Act,” 2011 Arizona Session Laws,
6 Chapter 251, which Governor Janice K. Brewer signed into law on April 26, 2011. The law
7 amended Title 23, Chapter 2, Article 7 of the Arizona Revised Statutes (“A.R.S.”) by adding
8 section 23-361.02. The statute requires that organizations collecting funds through checkoff
9 payroll deductions either affirm to the employers who process the deductions that none of
10 their general fund is used for “political purposes,” or specify the percentage of their general
11 fund so used. A.R.S. § 23-361.02(B). The law defines “political purposes” to mean
12 “supporting or opposing any candidate for public office, political party, referendum, initiative,
13 political issue advocacy, political action committee, or other similar group.” *Id.* § 23-
14 361.02(I). Employers may not deduct the percentage of an employee’s contribution used for
15 political purposes without written authorization from the employee; consent must be re-
16 authorized each year. *Id.* § 23-361.02(B),(C). An organization receiving funds from payroll
17 deduction that spends more of its operating fund on political purposes than the percentage it
18 reported to the employer is subject to a minimum civil fine of \$10,000. *Id.* § 23-361.02(D).

19 While the law is written to have general application to all payroll deductions, it
20 explicitly exempts a number of types of deductions from its scope, including, among others,
21 deductions for the benefit of charitable organizations and organizations that provide employee
22

23 ¹ Charitable organizations may lose their federal tax-exempt status if a “substantial
24 part” of their activities include “carrying on propaganda, or otherwise attempting, to
25 influence legislation.” 26 U.S.C. § 501(c)(3). Although there is no statutory or regulatory
26 definition of what constitutes a “substantial part” of an organization’s activities, courts have
27 found that less than 5% of an organization’s activity is not substantial, while over 16.6% is
28 substantial. *See Seasongood v. Comm’r*, 227 F.2d 907 (6th Cir. 1955); *Haswell v. U.S.*, 500
F.2d 1133 (Ct. Cl. 1974).

1 health care, retiree, or welfare benefits. *Id.* § 23-361.02(E). In addition, SB 1365 excludes
2 from its definition of employee “any public safety employee, including a peace officer,
3 firefighter, corrections officer, probation officer or surveillance officer.” *Id.* § 23-361.02(H).
4 As a result, no public safety employee union would be obliged to comply with the statute to
5 obtain its dues through payroll deductions from public safety employees. The law is scheduled
6 to go into effect on October 1, 2011. *Id.* § 23-361.02(A).

7 On May 9, 2011, Plaintiffs United Food & Commercial Workers 99, et al. filed a
8 complaint challenging SB 1365’s companion legislation, SB 1363, as unconstitutional. (Doc.
9 1). Plaintiffs amended their complaint to allege that SB 1365 is also unconstitutional. (Doc.
10 8). Plaintiffs further moved for a preliminary injunction to prevent SB 1365 from going into
11 effect. (Doc. 14).² This Court granted leave to the American Education Association and other
12 unions to intervene as Plaintiffs. (Doc. 47). Plaintiff-Intervenors moved for a preliminary
13 injunction on August 4, 2011. (Doc. 77). This Order considers the claims made in both
14 Plaintiffs’ and Plaintiff-Intervenors’ motions.

15 DISCUSSION

16 I. SUBJECT-MATTER JURISDICTION AND RIPENESS

17 In their response, Defendants apparently incorporate the arguments made in their
18 Motion to Dismiss on lack of subject-matter jurisdiction, lack of ripeness, and immunity from
19 suit under the Eleventh Amendment to the United States Constitution. (Doc. 50). To the extent
20 they do so, these arguments lack merit. Federal courts have subject-matter jurisdiction over
21 “all civil actions arising under the Constitution, laws, or treaties of the United States.” 28
22 U.S.C. § 1331. Plaintiffs allege that SB 1365 is pre-empted by the Supremacy Clause of the
23 U.S. Constitution, and Plaintiff-Intervenors allege that SB 1365 violates the First Amendment.
24 (Docs. 8, 52). The Court has jurisdiction to entertain constitutional challenges to state statutes.
25 28 U.S.C. § 1331. To the extent that the parties allege they may choose to restrict their own

27 ² No injunction is sought against SB 1363.

1 speech in order to comply with an unconstitutional law, the complaint is ripe for adjudication.
2 *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1154–55 (9th Cir. 2000) (holding that a court may hear a
3 constitutional challenge to a law that has not yet been enforced when “the plaintiff intends to
4 engage in ‘a course of conduct arguably affected with a constitutional interest’ and that there
5 is a credible threat that the challenged provision will be invoked against the plaintiff.”)
6 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). Finally,
7 Plaintiff-Intervenors are seeking injunctive relief against the Attorney General to prevent him
8 from enforcing an allegedly unconstitutional state law; such suits are not barred by the
9 Eleventh Amendment because “official-capacity actions for prospective relief are not treated
10 as actions against the State.” *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985); *see also*
11 *Ex Parte Young*, 209 U.S. 123 (1908).³

12 **II. LEGAL STANDARD**

13 To be granted a preliminary injunction, a plaintiff must establish four elements. A
14 plaintiff must establish “that he is likely to succeed on the merits, that he is likely to suffer
15 irreparable harm in the absence of preliminary relief, that the balance of equities tips in his
16 favor, and that an injunction is in the public interest.” *Winter v. Nat't Res. Def. Council*, 555
17 U.S. 7, 20 (2008); *see* FED. R. CIV. P. 65. The Ninth Circuit continues to analyze these four
18 elements using a “sliding scale” approach, in which “the elements of the preliminary
19 injunction test are balanced, so that a stronger showing of one element may offset a weaker
20 showing of another.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir.
21 2011). The element of irreparable injury is not subject to balance; the moving party must
22 “demonstrate that irreparable injury is *likely* in the absence of an injunction.” *Winter*, 555
23

24
25 ³ In their Motion to Dismiss, State Defendants further argue that Governor Brewer,
26 Secretary of State Bennett, and Director of the Labor Department Maruca are immune from
27 suit under the Eleventh Amendment. (Doc. 40). Because Plaintiff-Intervenors have only
sought a preliminary injunction against Attorney General Horne, it is not yet necessary to
determine whether immunity protects the other parties. (Doc. 77).

1 U.S. at 22 (emphasis in original). Should the moving party demonstrate a very high likelihood
2 of injury, however, the likelihood of success on the merits may be relaxed. In such cases, an
3 injunction may be granted when “serious questions going to the merits were raised and the
4 balance of hardships tips sharply in the plaintiff’s favor.” *Wild Rockies*, 632 F.3d at 1135,
5 quoting *The Lands Council v. McNair*, 57 F.3d 981, 987 (9th Cir. 2008).

6 **III. MERIT OF CLAIMS**

7 Plaintiffs make three broad arguments regarding SB 1365. First, they argue that the
8 statute is unconstitutional under the Supremacy Clause because it is pre-empted by the Labor
9 Management Relations Act (“LMRA”) and the National Labor Relations Act (“NLRA”).
10 Next, they argue that the statute is impermissibly vague and overbroad. Finally, they claim
11 that the statute is pre-empted by the Federal Election Campaign Act (“FECA”). (Doc. 14).
12 Plaintiff-Intervenors argue that the law violates the First Amendment, both because it burdens
13 protected political speech and it discriminates on the basis of speaker and viewpoint. Next,
14 they argue that the law violates the Fourteenth Amendment because its exception for public
15 safety unions is not rationally related to a legitimate governmental interest. They also argue
16 that the law imposes unconstitutional conditions on payroll deductions. They claim that the
17 law violates the Contracts Clause of the United States Constitution. They also assert that the
18 statute is unconstitutionally vague. (Doc. 77).

19 This Order addresses the First Amendment challenges in detail. Because the Court
20 determines that Plaintiffs are likely to succeed in demonstrating that SB 1365 violates the First
21 Amendment, Defendants are from enforcing it, pending determination on the merits. It will
22 therefore not be necessary to discuss Plaintiffs’ and Plaintiff-Intervenors’ remaining claims.

23 The statute specifically exempts from its regulatory structure payroll deductions for
24 contributions to charitable organizations; payments to organizations that administer
25 healthcare, retirement, or welfare benefits; payment of taxes; and donations to unions’
26 political action committees. A.R.S. § 23-361.02(E). Five types of public safety employees,
27 including police officers, firefighters, corrections officers, probation officers, and surveillance

1 officers, are exempted from the law’s definition of “employee.” *Id.* § 23-361.02(H). As a
2 result, the burdens imposed by the law do not fall equally on similarly-situated groups. The
3 law therefore violates the First Amendment by discriminating against “those wishing to
4 express less favored or more controversial views.” *Police Dept. of City of Chicago v. Mosley*,
5 408 U.S. 92, 96 (1972).

6 Viewpoint discrimination occurs when the government burdens “speech by particular
7 speakers, thereby suppressing a particular view about a subject.” *Moss v. U.S. Secret Service*,
8 572 F.3d 962, 970 (9th Cir. 2009) (internal quotations omitted). Statutes engage in viewpoint
9 discrimination when they place “special prohibitions on those speakers who express views on
10 disfavored subjects.” *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992). “The government must
11 abstain from regulating speech when the specific motivating ideology or the opinion or
12 perspective of the speaker is the rationale for the restriction.” *Rosenberger v. Rector and*
13 *Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995). On the other hand, “laws that
14 confer benefits or impose burdens on speech without reference to the ideas or views expressed
15 are in most instances content neutral.” *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 643
16 (1994).

17 A regulation that burdens speech may discriminate by viewpoint through its
18 underinclusiveness—that is, because it fails to burden all similarly situated parties equally.
19 In particular, “an exemption from an otherwise permissible regulation of speech may represent
20 a governmental ‘attempt to give one side of a debatable public question an advantage in
21 expressing its views to the people.’” *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (quoting
22 *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978)). “Underinclusiveness raises
23 serious doubts about whether the government is in fact pursuing the interest it invokes, rather
24 than disfavoring a particular speaker or viewpoint.” *Brown v. Entertainment Merchants*
25 *Ass’n.*, 131 S. Ct 2729, 2740 (2011).

26 A recent Supreme Court case upholding a statute barring public sector employees from
27 contributing to political action committees through payroll deductions includes instructive

1 commentary on underinclusiveness. *See Ysursa v. Pocatello Educ. Ass'n.*, 129 S. Ct. 1093
2 (2009). The statute at issue in *Ysursa* prevented public-sector employees from using the
3 payroll-deduction system to donate to any political action committee. I.C. §§ 44.2001–07. The
4 law only applied to public-sector employees and only prohibited them from using payroll
5 deduction to donate to overtly political organizations. *Id.* It treated union and non-union
6 employees identically, did not exempt particular unions, and did not change how union
7 members paid their regular dues. *Id.* The Court reasoned that the statute was not subject to
8 strict scrutiny, because “Idaho does not suppress political speech but simply declines to
9 promote it through public employer checkoffs for political activities.” *Ysursa*, 129 S. Ct. at
10 1099. The Court emphasized that the statute does not impose on First Amendment rights
11 because it “applies to all organizations, to any deduction regarding political issues, applies
12 regardless of viewpoint or message, applies to all employers, and it does not single out any
13 candidates or issues.” *Id.* at 1099 n.3. The Court emphasized that the law’s treatment of
14 similarly-situated organizations (all of them overtly political organizations) was
15 “evenhanded.” *Id.* It further stated that, should the state enforce the ban in an uneven manner,
16 the unions could bring a challenge to the law as it was applied, suggesting that such
17 enforcement might violate the First Amendment. *Id.*

18 The law at issue here, however, places restrictions on an employee’s ability to donate
19 through payroll deductions to an organization that engages in political activity depending
20 upon the identity of the organization receiving the donation. Employees may thus use payroll
21 deductions to supply money to charitable organizations; banks, trusts, and organizations that
22 administer retiree plans; or insurance companies or other organizations that provide health
23 care or welfare benefits. A.R.S. § 23-361.02(E)(1–5). The Defendants do not dispute that such
24 organizations may spend such funds for political purposes. Moreover, SB 1365 overtly
25 exempts employees who typically are members of public safety unions from its regulations.
26 *Id.* § 23-361.02(H). The functional result of SB 1365’s numerous exceptions is that the
27 burdens imposed by the law fall principally, if not solely, on unions collecting dues. Even
28

1 then, they do not fall squarely on unions representing police officers, firefighters, corrections
2 officers, probation officers, or surveillance officers. *Id.*

3 Organizations that wish to use payroll deduction to fund their political activity but are
4 not exempted from the statute are disadvantaged from doing so in at least three ways. First,
5 the statute requires them to disclose to the employers of their constituents the maximum
6 percent of the amount deducted that will be used for political activity. A.R.S. § 23-361.02(B).
7 Second, the law imposes a minimum fine of \$10,000 per occurrence if an organization
8 exceeds that maximum percent. *Id.* § 23-361.02(D). Third, it requires the annual authorization
9 of each employee to initiate or continue payroll deduction. *Id.* § 23-361.02(B). Exempted
10 organizations are subject to no such requirements to receive payroll deductions subsidizing
11 their political activity.

12 As the Court recognized in *Citizens United*, some disclosure requirements that may
13 burden speech are subjected to something less than strict scrutiny. *Citizens United*, 130 S.Ct.
14 at 915 (holding a statute requiring the identification of political contributors valid because the
15 state demonstrated “a ‘substantial relation’ between the disclosure requirement and a
16 ‘sufficiently important’ governmental interest.”) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64,
17 66 (1976). Of course, there are a number of distinctions between the permissible disclosure
18 requirement discussed in *Citizens United* and the statute set forth here. First among them is
19 that *Citizens United* made no suggestion that the state could compel some political speakers
20 in a similar class to disclose their donors, while exempting other similarly-situated political
21 speakers from such a requirement.

22 Second, unlike the provisions upheld in *Citizens United* or *Buckley*, the requirements
23 of SB 1365 are forward-looking. They apparently require the non-exempt organizations to
24 anticipate in advance the amount they intend to spend on political purposes for a given year.
25 If they underestimate, they are penalized a minimum of \$10,000. A.R.S. 23-361.02(A),(D).
26 This fine “serves to deter and may even preclude expression necessary to provide an
27 immediate response to late-breaking events.” *Grossman v. City of Portland*, 33 F.3d 1200,
28

1 1206 (9th Cir. 1994) (internal quotations omitted). Since such organizations would be bound
2 by estimates they must make long before the facts of any particular political season emerge
3 with clarity, the provision places a \$10,000 penalty on “speech in situations where the
4 communication was not, or could not have been, prepared far enough in advance.” *Arizona*
5 *Right to Life Political Action Committee v. Bayless*, 320 F. 3d 1002, 1008 (9th Cir. 2003).

6 This fine, and the ceiling on spending that this fine enforces, is not a disclosure
7 requirement. It is a financial burden that political speakers subject to the law may be required
8 to pay to match the speech of their political opponents. The Supreme Court has held that
9 adding costs to political speech relative to a political speaker’s rivals represents “a special and
10 potentially significant burden.” *Davis v. Federal Election Comm’n*, 554 U.S. 724, 739 (2008);
11 *see also Arizona Free Enterprise Club’s Freedom Club Freedom PAC v. Bennett*, 131 S.Ct.
12 2806, 2822 (2011).

13 The Court, however, need not analyze whether the state, through a law written to be
14 generally applicable and uniformly applied, could impose such burdens on collecting funds
15 through the payroll deduction program for political purposes. The statute at issue is not
16 generally applicable, and is not “evenhanded.” *Ysursa*, 129 S. Ct. at 1099 n.3. By imposing
17 its burdens on the political speech of some unions and other organizations and not imposing
18 like costs upon other similarly-situated unions, or on other organizations that can use the
19 funds for political activity, the law is underinclusive and discriminates according to speaker.
20 *City of Ladue*, 512 U.S. at 51. As such, the law is subject to strict scrutiny. Defendants do not
21 argue that SB 1365 can survive strict scrutiny. Plaintiffs are therefore likely to succeed on the
22 merits of their claim that the law violates the First Amendment and is therefore
23 unconstitutional.

24 The statute contains a severability clause, which provides that “[i]f any provision of
25 this act or its application to any person or circumstance is held invalid, the invalidity shall not
26 affect other provisions or applications of this act that can be given effect without the invalid
27 provision or application, and to this end the provisions of this act are severable.” Ariz. Laws
28

1 2011, Ch. 251 § 3. Whether or not to enforce a severability provision “is of course a matter
2 of state law.” *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). In Arizona, determining whether
3 a provision may be severed “requires ascertaining legislative intent.” *Republic Inv. Fund v.*
4 *Town of Surprise*, 166 Ariz. 143, 151, 800 P.2d 1259 (1990). A court may invalidate a law
5 in its entirety if the valid and invalid portions are so interrelated as “to raise the presumption
6 that the legislature would not have enacted the one without the other.” *Campana v. Arizona*
7 *State Land Dep’t*, 176 Ariz. 288, 294, 860 P.2d 1341, 1347 (1993) (internal quotations
8 omitted).

9 Here, to render SB 1365 viewpoint-neutral, it would be necessary to sever not merely
10 the public safety employee provisions, but also the exemptions for donations to charitable
11 organizations and to health, welfare and retiree benefit associations as well. A.R.S. § 23-
12 361.02(E)(2–3),(H). As a result, every charity, health insurance company, bank, or investment
13 firm that receives money through any Arizona worker’s payroll deduction would need to start
14 complying with the law’s provisions by October 1. Such a law would be dramatically broader
15 in scope than the one that the legislature in fact passed. Arizona courts have refused to strike
16 unconstitutional exceptions to legislation when they conclude “that the legislature would not
17 have enacted the statute without [the exception].” *In re Cesar R.*, 197 Ariz. 437, 441, 4 P.3d
18 980, 984 (1999). Striking only the exceptions and permitting a much broader regulation
19 would, “in effect, cause the court to legislate a blanket [regulation] that the [legislature] did
20 not itself enact.” *World Wide Rush, LLC v. City of L.A.*, 563 F. Supp. 2d 1132, 1146 (C.D.
21 Cal. 2008). For this reason, the Court determines that it cannot sever the sections of the statute
22 that make it likely Plaintiff-Intervenors will prevail on their claims.

23 **IV. IRREPARABLE HARM**

24 In addition to demonstrating a likelihood of success on the merits, Plaintiffs must
25 demonstrate “that irreparable injury is *likely* in the absence of an injunction.” *Winter*, 555 U.S.
26 at 20 (emphasis in original). “The loss of First Amendment freedoms, for even minimal
27 periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347,
28

1 373 (1976). When the speech that is so burdened is political in nature, “[t]he harm is
2 particularly irreparable.” *Klein v. City of San Clemente*, 584 F. 3d 1196, 1208 (9th Cir. 2009).
3 Since Plaintiff-Intervenors’ claim implicates the core protections offered by the First
4 Amendment, the harms they would suffer should SB 1365 go into effect are irreparable per
5 se.

6 **V. BALANCE OF EQUITIES**

7 The third preliminary injunction factor requires the court “to balance the interests of
8 all parties and weigh the damage to each.” *L.A. Memorial Coliseum Comm’n v. Nat’l Football*
9 *League*, 634 F.2d 1197, 1203 (9th Cir. 1980). At this step, “balancing the injury of a third
10 party against plaintiff’s” is frowned upon. *Id.*

11 As discussed above, Plaintiffs and Plaintiff-Intervenors have demonstrated that they
12 are likely to suffer irreparable loss of core First Amendment rights. Defendants will suffer the
13 hardship of both delay in the implementation of the law should it ultimately be found to be
14 constitutional and delay in writing the rules that will implement the legislation. Defendants’
15 harms are not substantial enough to tip the balance of equities against Plaintiffs and Plaintiff-
16 Intervenors. The balance of equities weigh in favor of an injunction.

17 **VI. PUBLIC INTEREST**

18 Determining whether an injunction is in the public interest “addresses impact on non-
19 parties rather than parties.” *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th
20 Cir. 2002). In the First Amendment context, the public interest can tilt against an injunction
21 in certain limited circumstances. *See, e.g., Hale v. Dep’t of Energy*, 806 F.2d 910, 918 (9th
22 Cir. 1986) (safety and security of nuclear testing site may favor public interest over First
23 Amendment claim). Ordinarily, however, courts have “consistently recognized the significant
24 public interest in upholding First Amendment principles,” even when the rights at stake are
25 those of the parties and not the general public. *Sammartano*, 303 F.3d at 974. Moreover,
26 employees and organizations who are not parties to this lawsuit would see their political
27 speech burdened should the law go into effect. Since Plaintiff-Intervenors demonstrate that

1 they are likely to succeed in showing that the law violates the First Amendment because it
2 discriminates according to viewpoint, the public interest tilts in favor of an injunction.

3 **VII. SECURITY**

4 A court may issue a preliminary injunction “only if the movant gives security in an
5 amount that the court considers proper to pay the costs and damages sustained by any party
6 found to have been wrongfully enjoined or restrained.” FED. R. CIV. P. 65(c). Although the
7 plain language of the rule suggests that a bond is mandatory, the Ninth Circuit has held that
8 it “invests the district court with discretion as to the amount of security required, *if any.*”
9 *Johnson v. Courturier*, 575 F.3d 1067, 1086 (9th Cir. 2009). A district court need not require
10 a bond “when it concludes there is no realistic likelihood of harm to the defendant from
11 enjoining his or her conduct.” *Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003).
12 There is no realistic likelihood that Defendants will be harmed by being enjoined from
13 enforcing a law that constitutes viewpoint discrimination in violation of the First Amendment
14 on its face. No bond will be required.

15 **VIII. OTHER CLAIMS**

16 The Court has read and considered the remaining claims, and the statute presents
17 further questions beyond those discussed above. The pre-emption questions are serious and
18 complex. However, since SB 1365, as a law of general application, could only be pre-empted
19 as it applies to private sector employees covered by the LMRA and the NLRA, and since
20 Defendants are, at any rate, enjoined from enforcing the law in its entirety on First
21 Amendment grounds, it is unnecessary at this stage to determine such issues. For the same
22 reason, the Court will refrain from ruling on the other claims, including those alleging that the
23 law is impermissibly vague, imposes unconstitutional conditions, violates equal protection,
24 is pre-empted by election law, and violates the Contracts Clause.

25 **CONCLUSION**

26 Plaintiffs and Plaintiff-Intervenors have shown a likelihood that they will succeed in
27 demonstrating that the law’s exceptions render it underinclusive, and that it therefore

1 discriminates according to viewpoint in violation of the First Amendment. The claims allege
2 constitutional harms, which are necessarily irreparable. The balance of equities and the public
3 interest likewise tilt in favor of enjoining a law that implicates core constitutional rights.

4 **IT IS THEREFORE ORDERED** that Plaintiff-Intervenors' Motion for a Preliminary
5 Injunction (Doc. 77) is **GRANTED**.

6 **IT IS FURTHER ORDERED** that Plaintiffs' Motion for a Preliminary Injunction
7 (Doc. 14) is **DISMISSED AS MOOT**.

8 **IT IS FURTHER ORDERED** that Attorney General Horne is preliminarily enjoined
9 from enforcing Senate Bill 1365, creating A.R.S. § 23-361.02.

10 DATED this 23rd day of September, 2011.

A. Murray Snow

G. Murray Snow
United States District Judge